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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONOVAN DAWANEY PIERRE, Defendant and Appellant.	A126788 (Napa County Super. Ct. No. CR142481)

Donovan Dawaney Pierre appeals from his conviction of second degree murder, following his plea of no contest. (Pen. Code, § 187, subd. (a).) Appellant asserts in his own notice of appeal, and by an application for a certificate of probable cause, that his plea is invalid due to ineffective assistance of counsel. His appointed counsel on appeal raises no issues and asks this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

BACKGROUND

The information charged appellant and codefendant Derrice Lewis in count one, with murder (Pen. Code, § 187, subd. (a)); in count two with second degree robbery (Pen. Code, § 211); and in count three[1] with second degree murder (Pen. Code, § 187, subd. (a)). After the preliminary hearing, the court granted the dismissal of counts one and two; and appellant pleaded no contest to count three, pursuant to the California Rules of Court, rule 4.412.

[1] The court granted the people's motion to amend the information to allege count three.

At the preliminary hearing, the court heard from the following witnesses: the codefendant's sister and mother; the forensic pathologist who conducted the victim's autopsy; and the Napa police officers and detective who found the victim's body and interviewed percipient witnesses.

On September 22, 2008, shortly after 9:00 p.m., Napa Police Officers Shannon Bohlander and Eric Thompson received a dispatch to investigate an assault. They found the victim unconscious and lying on the ground; and he soon expired. Officer Bohlander reported that the victim's body had several contusions on the head, a considerable amount of blood on the face, and a cut above the left eye.

An autopsy of the body revealed the serious injuries leading to the victim's death. The forensic pathologist who conducted the autopsy testified that he observed these injuries: three head abrasions, a bruise on the forehead, and bruising around the eyes. The pathologist found "pattern injuries" of shoe sole tread marks on the victim's scalp—an indication that his attackers kicked him in the head. The victim also had defensive injuries to his arms. The pathologist's internal examination disclosed that the victim's brain was swollen and bleeding. He opined that the external injuries were consistent with the results of an attack, but that some of the injuries might also be attributed to the victim's fall to the ground. He also concluded that although the primary cause of death may have come from blunt force injuries to the victim's head, no single blow caused the death. Cumulative blunt force trauma caused the death.

Consistent with the pathologist's description of causation, Officers Thompson and Bohlander reported that witnesses described how the victim was injured. Officer Thompson interviewed a witness, Sergio Cendejas, who could not provide a detailed description of the participants but stated that he saw a fight involving three people, two of whom kicked the third person before leaving him lying on the ground. Officer Bohlander spoke with two other witnesses who saw the fight from their window and attempted to render assistance. They told Officer Bohlander they overheard one of the assailants say that the victim had no money, saw two people punching the victim, and watched the

victim fall to the ground. These witnesses also provided a general description of the two suspects.

Napa Detective Brian Campagna later interviewed these witnesses and described what they reported to him. Veronica Ortiz told Detective Campagna that she heard noises outside her window, she peered out her window, saw someone running southbound, and heard the words "money or no money." Her husband, Kevin Brooks, said he grabbed a flashlight and went outside where he saw two people assaulting a third person. He returned inside to call 911. After he completed the emergency call, Ortiz called another neighbor for help before going out to the street herself, where she found the victim and attempted to render medical aid.

The description of the assault was corroborated by the testimony of the codefendant's sister-in-law, Adriana Lewis, and the codefendant's mother, Irene Lewis. Adriana, who lived with appellant and the codefendant, described the incident as follows: around 6:00 p.m. on the night of the incident, she saw appellant and codefendant dress in dark clothes and heard that the two men were determined to go out and get bail money for Tiffany Lewis, the sister of Adriana and the codefendant.

They returned after 9:00 p.m. and told Adriana that they "jumped and punched" a young boy near their apartment. The men showed Adriana the things they took from the boy: money, a cell phone, and some marijuana. Adriana looked through the cell phone and recognized pictures of the victim, who was a resident of her apartment complex. The codefendant told her that he "punched" the victim and caused him to pass out and fall to the ground. Appellant told her that he "kicked" the victim. Appellant later told her that he came back and tried to stop codefendant after initially leaving the fray; and that he had difficulty "getting [codefendant] off" the victim.

After a grant of use immunity, Irene recounted similar facts. Irene stated that she saw both men dressed in black at 7:00 p.m. on the day of the altercation, noticed they were missing from the apartment, and saw them return around 9:30 p.m. When Irene saw the men return, she added that appellant wore steel-toed boots, and that codefendant also wore black, including his tennis shoes. Codefendant told her that he "just finished

beating up" a "little boy" and took his "weed" and money. She testified that appellant told her codefendant pinned the victim down with punches; and that appellant "ran over and kicked the boy in the head twice" before "pulling [codefendant] off" and running. She stated that appellant was present in the living room while codefendant described the night's events.

Codefendant also gave a statement to Detective Campagna about the altercation. He told the detective that he and appellant decided to rob someone for the money needed to make bail for his sister. They confronted the victim on the dark street and demanded the contents of his pockets. When he did not comply, codefendant grabbed him by the neck and threw him to the ground before kicking him three times. The codefendant also told Detective Campagna that appellant had worn steel-toed boots that night. He also said he took the victim's marijuana, cell phone, and $10, which he gave to Irene.

Detective Campagna testified that codefendant cooperated during the interview, but attempted to minimize appellant's role in the assault. Prior to his interview with the codefendant, Detective Campagna taped a conversation between codefendant and his mother, Irene, in the interview room. He recorded Irene urging her son the codefendant to implicate appellant. Codefendant refused because he believed that he had killed the victim with his punch to the head.

Based on the foregoing preliminary hearing testimony, the court found a factual basis for appellant's no contest plea to the charge of second degree murder and sufficient support for the allegation of implied malice. Appellant was sentenced to an indeterminate term of 15 years to life in prison and ordered to pay restitution to the victim's family and to the California Victim Compensation Government Claims Board. In accordance with the negotiated plea, the court correctly denied probation and granted credit for time served.

Appellant filed his own timely notice of appeal and his trial counsel filed an amended notice. Both notices included an application for certificate of probable cause to assert that appellant's change of plea was invalid because his appointed counsel and the district attorney either coerced or led him into believing that he would be released from

prison on parole. Appellant asserts that he was denied effective assistance of counsel because he subsequently learned that inmates sentenced to life in prison are most likely to remain in prison without parole.

DISCUSSION

Appellant's effort to set aside the conviction based on his change of plea rests on his asserted ignorance, at the time, of the fact that parole for prisoners serving indeterminate life terms is the exception rather than the rule. His amended request for a certificate of probable cause states: "that his plea was not a knowing, intelligent and voluntary waiver of his rights as he was coerced by his counsel and the District Attorney and was led to believe that he would be released from prison when he has subsequently learned that inmates in his position are never likely to be released. [¶] [He] asserts that he was denied effective assistance of counsel."

A change of plea is valid "if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) To determine whether the plea was voluntary, we independently review the totality of the circumstances. (*People v. Guzman* (1993) 14 Cal.App.4th 1420, 1422.) This record demonstrates that the trial court thoroughly advised appellant of the direct consequences of his plea. Twice the court asked whether appellant understood that the second degree murder charge carried a sentence of 15 years to life; both times, appellant responded "Yes." The court also asked, "Has anyone promised you anything or threatened you in any way to get you to enter this no-contest plea today?" Appellant responded, "No." This response is consistent with the written plea form signed by appellant, which states: "No one has used any threats, force, violence, duress or undue influence of any kind on me, or anyone close to me, in order to get me to plead guilty or no contest." The court found that appellant had initialed and signed the plea form to indicate he entered the plea knowingly, intelligently, and voluntarily. We cannot discern coercion from these facts.

On the claim of ineffective assistance of counsel, appellant must satisfy the two-prong *Strickland* test to prevail. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-

694.) First, appellant must affirmatively show that " 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, quoting *Strickland*, at p. 688.) Secondly, appellant must show prejudice resulted from counsel's inadequacy by demonstrating that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*Ledesma*, at pp. 217-218, quoting *Strickland*, at pp. 693-694.)

We "will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582; accord *People v. Hart* (1999) 20 Cal.4th 546, 623-624; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Wilson* (1992) 3 Cal.4th 926, 936.) Ordinarily, such a claim is not cognizable on appeal absent an adequate record for review. (*People v. Everett* (1986) 186 Cal.App.3d 274, 279.) Although a writ of habeas corpus is the more appropriate way to raise the issue of incompetent counsel (*ibid.*), the issue arises in this case based on a request contained in the amended notice of appeal and without apparent prior consideration by the trial court. We will consider the request as if denied.

We are aware of claims made in other cases that the parole process in California has been politicized and is not functioning as intended by the legislation establishing it.

However, we are not persuaded by appellant's assertion that his plea was uninformed because his counsel did not give him information to evaluate the likelihood of his release on parole after 15 years. To determine whether an inmate should be released on parole, the Board of Prison Terms considers the individual circumstances of the inmate's criminal record and of the crime for which he or she is incarcerated, behavior while incarcerated, and postrelease plans. (Pen. Code, § 3041; Cal. Code Regs., tit. 15, §§ 2281, 2400-2402; see *In re Rosenkrantz* (2002) 29 Cal.4th 616, 653-655.) Because the parole decision is a discretionary determination based on a wide variety of factors, including conduct during incarceration, an attempt by defense counsel to

prospectively assess the likelihood of future parole would be speculative. Appellant has not shown that knowledgeable consideration of the plea bargain offer required his counsel to discuss the chances he might obtain parole; this would be true whether or not the current statutory parole scheme is asserted to be malfunctioning.

Appellant has not provided any information to support the proposition that counsel should have supplied him with information that the possibility of parole was an illusory promise. We are aware of the political and legal controversy surrounding the issue of whether convicted murderers have been automatically denied parole. (See *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 684-685 [recognizing that blanket no-parole policy violates due process, but concluding evidence did not support existence of such a policy under former Governor Gray Davis]; See *In re Smith* (2003) 114 Cal.App.4th 343, 361-363, and *In re Calderon* (May 13, 2010, A125831) ___ Cal.App.4th ___ [2010 D.A.R. 6859].) However, if we assume that the premise of appellant's argument is that there is a blanket policy against giving parole to defendants convicted of certain types of offenses, appellant has failed to provide any evidence of such a policy.

We must conclude on this record that the voluntariness of a defendant's plea is not undermined by the fact that he was not advised of the possibility that the executive branch may improperly adopt such a policy. Given the speculative nature of predicting an inmate's future eligibility for parole and the vagaries of any such alleged improper implementation of parole policy—as well as the fact that the policy remains subject to correction in the courts—an informed plea bargain decision does not require defense counsel to discuss this issue.

DISPOSITION

Our independent review of the record reveals no arguable issues that require further briefing. Appellant's claim of ineffective assistance of counsel fails on this record because he entered his plea intelligently and voluntarily. The judgment is affirmed.

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Lambden, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.